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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WARNA IRENE LEWIS,
Petitioner,

VS.

PEARSON FOUNDATION, INC., et al.,
Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Implicitly recognizing no independent reason for this Honorable Court to grant certiorari on the flowery and exaggerated allegations of the Petition, the Petitioner, in an untimely manner, instead tries to ride the coattails of *Bray v. Alexandria Women's Health Clinic*, No. 90-985. In *Bray* a right to travel theory (not present in the instant case) is tried for application of 42 U.S.C. § 1985(3) against actions designed to rescue unborn children against human abortion. Although cavernous differences between these two cases exist, the questions presented to this court in this case are as follows:

1. Was the Petition for Writ of Certiorari timely filed?

2. Was 42 U.S.C. Section 1985(3) intended to protect against other than racial or racially-related discrimination?

3. Does a moral belief against abortion meet the requirement of a class-based invidious discriminatory animus necessary in order to state a claim for relief, and is the class attempted to be asserted by the Appellant a protected class?

4. A "fundamental right to abortion" does not exist, but whatever right or interest that does exist, if any, does not exist against private conduct.

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BRIEF FOR RESPONDENTS IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

I. Allegations and Non-Allegations of the Complaint

Nowhere in the Petition is it claimed that the Petitioner was deprived of a constitutional right to interstate travel (and this possible theory is specifically disclaimed by the Appellant, App. Br. 14, footnote 1).

Plaintiff Warna Lewis bases her civil claim for money damages on 42 U.S.C. Section 1985(3) and alleges mental distress, anxiety, anguish, and anger among her damages. Appellant's

Brief A-43, 44. But she does not claim any medical bills, lost earnings, or special damages of any kind except for a day and a half of vacation time. App. Br. A-44. The suit is sponsored by the American Civil Liberties Union. App. Br. A-44.

Plaintiff initially brought her action for money damages against Respondents Mother and Unborn Baby Care of St. Louis d/b/a Triple A Pregnancy Problem Center, a counseling center she visited twice without charge, the Pearson Foundation, Inc., various corporate officers and directors, some workers, and "Elizabeth Doe", alleged to be one of the center's staff members or employees. App. Br. A-37, 38. She alleges no contact or dealings with Defendants, Pearson Foundation, Inc. or any of its officers or directors. The Plaintiff is not proceeding against Defendants Robert J. Pearson and Kathleen J. Pearson as reflected by her footnote on page ii, and therefore said individuals are no longer part of this appeal.

Plaintiff objects to the operation of what she claims is a fake abortion clinic, and recites that she was misled by an ad, and was shown an audio-visual presentation of an abortion. App. Br. A-39, 40. She claims she was misled but did later obtain the abortion she sought shortly thereafter. App. Br. A-42.

Plaintiff asserts that there was a conspiracy against her which was aided and abetted by the refusal of the Missouri Attorney General, who publicly stated his opinion that the Defendants' advertising does not constitute misrepresentation. App. Br. A-43.

The District Court sustained Motions to Dismiss filed by all Defendants and issued an opinion. By a two to one decision the three-judge panel overruled the District Court dismissal, however, the Court en banc vacated the three-judge panel decision and affirmed the dismissal of the District Court.

A Petition for Writ of Certiorari was filed on April 10, 1991 when the original order denying rehearing occurred on December 7, 1990. The timeliness of the Petition, *inter alia*, is later raised.

II. Proceedings in the Courts Below

At the trial level, questioning whether the Petition stated a claim for relief under Section 1985(3), the Respondents moved to dismiss the Complaint. Since the Petitioner's brief pays scant attention to the District Court decision, the controlling law of this case, it is necessary for these Respondents to adequately set forth the same.

After setting forth the facts obtained from the petition, the district court identified and addressed two particular issues. First, since the Plaintiff brings her complaint against *private actors*, does Section 1985(3) require state action to assert privacy and liberty claims found in the Fourteenth Amendment; and, secondly, is Plaintiff's asserted class such a class as is intended to be protected from invidious discriminatory animus by Section 1985(3). *Lewis v. Pearson Foundation, Inc.*, No. 87-894C(2) (E.D. Mo. Jan. 15, 1988).

Tracing the Supreme Court law on the subject, and citing *Griffin v. Breckenridge*, 403 U.S. 88, 102, 103 (1971), the district court observed that *Griffin* also applied the legislative history of the statute to require a class-based, invidiously discriminatory motivation behind the conspirator's action. In order to avoid the constitutional shoals that would lie in the path of interpreting § 1985(3) as a *general federal tort law*, the congressional purpose of requiring invidiously discriminatory motivation must be honored. There must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' actions. *United Brotherhood of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 834, 835 (1983).

In applying this intended narrow interpretation, the Supreme Court later held that "it is a close question whether § 1985(3) was intended to reach any class-based animus other than the animus against Negroes and those who championed their cause, most notably Republicans". It was ruled that a First Amendment right not to associate with a union did not fall within the purview of § 1985(3). In *Griffin*, however, the conspiracy was held to have been motivated by class-based animus against blacks and their supporters. The District Court found, and relied upon, a similar case, treating the threshold requirement that the class relied upon for jurisdiction, actually be a "protected class". In *Roe v. Abortion Abolition Society*, 811 F.2d 931 (5th Cir.), *cert. denied*, 108 S. Ct. 145 (1987), the alleged "victims" were also persons exercising their so-called "right" to an abortion or to provide abortions.

The District Court analyzed the need for class-based invidiously discriminatory animus, which Section 1985(3) was intended to protect against. *Lewis v. Pearson, supra*, E.D. Opinion. In its quest to determine whether the need was fulfilled, the averments of the Petition, framed by the appellant herself, were copiously reported. The Plaintiff goes out of her way to complain of what she perceives as the religious interest of all of the defendants. App. Br. A-11. She states that the motivation of the defendants is a moral-religious belief against abortion, in the words of appellant: "Positing a moral-religious standard for all of society . . ."; and "all as intensified by the fervor special and unique to those self-martyred to a boundless cause of the salvation of others, as these defendants professedly were." App. Br. A-11. However, the court points out, this "class" does not exist independently of defendants' actions, nor is there a common characteristic distinguishing the class from the rest of the population. App. Br. A-11. This alleged "religiously motivated conspiracy" transcends denominational religious lines. It is no more of a common trait or characteristic than would be a belief in using

seatbelts or in an ever-expanding universe. *Lewis v. Pearson, supra*, E.D., citing *Roe v. Abortion Abolition Society, supra*, at 935.

Since the Petition was obviously deficient for these reasons, other failings such as the lack of necessary state action, were not even necessary to be addressed.

With respect to the three-judge panel, an opinion later vacated by the court en banc, two of the three judges sought to expand application of Section 1985(3), even though admitting that *Scott* makes clear that Section 1985(3) creates no substantive rights. *Lewis v. Pearson*, 908 F.2d 318, 322 (8th Cir. 1990), *vacated*, No. 88-1293 (8th Cir. September 7, 1990) (en banc). The majority felt that § 1985(3) does not contain a state action requirement where the Plaintiff's claim finds its course in the rights announced in *Roe v. Wade*, and assumed that the so-called right to an abortion announced in 1973 remains in full force, and has not been watered down to the status of a general liberty interest (if a liberty interest at all).

The majority of the three-judge panel, making great strides towards establishing this statute as a general federal tort law, seemed to imply that § 1985(3) could be applied to deprivation of any equal protection of the laws, including trespass laws, contract laws, property laws, and tort laws. It was said that these sorts of rights have a life all their own, with or without state action, and therefore § 1985(3) applies. *Lewis*, at 323. The limitations of this "shotgun approach", if any, remain undefined. Since the majority ruled that no state action was required, it would not appear necessary or consistent for the majority to find state action. However, the opinion did equate a statement by the Attorney General that the center's advertising does not constitute misrepresentation, with active encouragement and participation in the alleged conspiracy. *Lewis, supra*, at 323.

The majority of the three judges did concede that *Griffin* involved the Thirteenth Amendment and the constitutional right of interstate travel. *Griffin, supra*, 104-06. In the instant case, Lewis claims no constitutional rights of interstate travel whatsoever, and in fact affirmatively denies the same in her brief. App. Br. 14, footnote 1.

Just as the prevailing District Court opinion was short-changed by the Petition for Writ of Certiorari, similarly the holding of the dissenting judge was afforded one paragraph attention by the Petitioner. The dissent (eventually the prevailing *result* because the three-judge opinion was vacated and the District Court opinion upheld) found it clear that the state must be demonstrated to be involved in or affected by the conspiracy. Since the Petition failed on its face to do so, a claim under Section 1985(3) was not stated. No discussion of other deficiencies was necessary, because the Petitioner was obliged to fulfill every essential element of a § 1985(3) showing. In other words, if a Petition is defective for five reasons, a finding that it is faulty on two followed by absence of discussion of the other three, does not imply approval of the other three deficiencies.

The dissent held that since the so-called right to abortion is protected only against governmental rather than private interference, it is logical that state action is required. *Lewis, supra* at 327, citing *Scott* at 833.

More particularly, as the so-called "privacy right" is based primarily on the due process clause of the Fourteenth Amendment, and since the due process clause protects individuals only against governmental interference and not against intrusions by private entities, state action must be required. *Lewis, supra* at 326.

The dissent observed that § 1985(3) is not a statute in which Congress exercised its power to reach private conduct that infringes on rights otherwise assertable only against private conduct. The fundamental principle, evident from the face of the

Fourteenth Amendment itself, is that rights protected by that amendment protect the individual only against state action. *Lewis*, at 327. Lewis failed to allege state action, a required element of a claim based on the Due Process Clause of the Fourteenth Amendment.

The Court en banc vacated the three-judge panel decision and affirmed by equal vote the dismissal of the District Court. The Honorable Floyd R. Gibson, a dissenting judge who voted to affirm the District Court's opinion, did not participate in the en banc decision.

REASONS FOR DENYING THE PETITION

I.

THIS COURT DOES NOT HAVE JURISDICTION BECAUSE THE PETITION FOR WRIT OF CERTIORARI WAS NOT TIMELY FILED

Supreme Court Rule 15.4 states that no Motion by a Respondent to Dismiss a Petition for Writ of Certiorari will be received. Objections to the jurisdiction of the Court to grant a Writ of Certiorari may be included in the brief in opposition. Therefore, no separate motion has been filed by these Respondents.

Supreme Court Rule 13, also treated by statute 28 U.S.C. Section 2101(c) (1982 Ed.), requires that a Petition for Certiorari in a civil case be filed within ninety days after entry of the judgment below. This ninety day limit is mandatory and jurisdictional. There is no authority to extend the period for filing except as Congress permits. Unless the Petition is filed within ninety days of the entry of judgment, the Petition must be dismissed. *Missouri v. Jenkins*, 110 S. Ct. 1651, 1660 (1990).

The history is an follows. On October 14, 1990 the judgment of the District Court was affirmed. App. Br. A-1, 2. The Petitioner says she filed a "Petition for Re-Hearing" on November 6, 1990 which was denied on December 7, 1990. App. Br. A-33. The December 7, 1990 order is quite clear in that the Court denied relief requested by the Appellant. The specific language is "Appellant's suggestion for rehearing en banc has been considered by the court and is denied for reason of the lack of a majority of the active judges voting to rehear the case en banc. Petition for rehearing by the panel is also denied."

The Petitioner, not liking this wording, obtained a revised order entered on December 17, 1990,which struck only the last full sentence of the December 7, 1990 order. App. Br. A-34. The December 17, 1990 order was merely a clarification of the

language set forth in the December 7, 1990 order, and in no way altered the result against the Appellant. The December 17, 1990 order did not change the December 7, 1990 order except for the last full sentence of the December 7, 1990 order.

Still complaining about the technical wording selected by the court, Petitioner obtained another clarification on January 10, 1991, which order vacated the December 7, 1990 and December 17, 1990 orders, and this time recited that "Appellant's Petition for Rehearing has been considered by the Court and is denied." App. Br. A-35. Again, affirmance of the District Court's judgment was not disturbed. The technical language was different, but the court in its orders of December 7, 1990, December 17, 1990, and January 10, 1991 steadfastly held to its ruling denying relief to the appellant, and did not in any way disturb the judgment of the District Court, and did not revise any legal rights or obligations disposed of by the District Court. The judgment previously entered on December 7, 1990 was re-entered or revised, but this did not toll the time within which review must be sought. It was always clear that the requests of the Petitioner-Appellant were denied. Nothing of substance was changed.

> "Thus, the mere fact that a Judgment previously entered has been re-entered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered, should the period within which an appeal must be taken or a Petition for Certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality." *Federal Trade Commission v. Minneapolis Honeywell R. Company*, 73 S. Ct. 245, 249 (1952)

That the Eighth Circuit Court of Appeals engaged in a series of clarifications to set the record straight, rather than changing a substantive ruling, is documented by the appellant's Petition where she notes "As the court of appeals ultimately made straight of record, the petitioner's filing of November 6, 1990, was a *petition* for rehearing relative to the court's en banc determination of October 24, 1990, and not a *suggestion* for rehearing *en banc*. The filing is therefore one made under Rule 40, and not Rule 35, of the Federal Rules of Appellate Procedure." App. Br. 2, 3." The appellant was merely trying to have the record reflect that her filing was a petition for rehearing en banc and not a suggestion for rehearing en banc. She was, in her words, merely "making straight the record".

In *Missouri v. Jenkins, supra*, the Supreme Court discussed the issue of whether a pleading filed was a "Petition for Rehearing" or "Suggestions for Rehearing En Banc". On October 14, 1988 the Court of Appeals denied the Petitions for Rehearing En Banc. On January 10, 1989, the Clerk of the Eighth Circuit issued an order amending the order of October 14, 1988, recalling the Court's mandate issued on October 14, 1988, and ordering that "the Petitions for Rehearing and the Petitions for Rehearing with Suggestions for Rehearing En Banc are denied. This order is entered nunc pro tunc effective October 14, 1990." *Jenkins* at 1659.

The court found that the Petition was timely filed because it was treated as a "Petition for Rehearing". However, the calculation as to whether the Petition was timely filed was computed as of October 14, 1988 (the original order), not January 10, 1989 (the amendment).

In other words, *Jenkins* held that the initial order was a denial of rehearing, but calculated the ninety day period from the date of the original October 14, 1988 order, rather than the later January 10, 1989 order. In the present case, Lewis would have

this court compute the time limit for filing her Petition to commence from the very last order entered, rather than from the denial of rehearing on December 7, 1990. This is opposite and contrary to the time calculation of the Supreme Court in *Missouri v. Jenkins, supra.*

In *Lewis*, the subsequent orders of December 17, 1990 and January 10, 1991 App. Br. A-34, 35 were merely formal clarifications (like the nunc pro tunc order in *Jenkins*), not dispositive rulings or reconsiderations of the December 7, 1990 order. Therefore, the ninety day period ran from December 7, 1990 and Lewis' Petition for Certiorari filed on April 10, 1991, is over a month untimely.

One last point on the lack of jurisdiction of this court should be made. Petitioner presumably assumes that the Eighth Circuit can in effect grant an extension of time to file a Petition for Certiorari simply by vacating and re-entering its previous order. However, there appears to be no statutory authority for a United States Court of Appeals to grant additional time for the filing of a Petition for Writ of Certiorari, and in fact, the Petitioner did not specifically request additional time. Supreme Court Rule 13.2 does recite that "A Justice of this Court, for good cause shown, may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days". However, this was never requested, and furthermore the request for extension must come before the time expires and the court loses jurisdiction of the case.

The Petition for Writ of Certiorari should be denied because of lack of jurisdiction of this Court.

II.

ALTHOUGH THE COURT HAS GRANTED CERTIORARI IN *BRAY v. ALEXANDRIA WOMEN'S HEALTH CLINIC*, THAT CASE WAS DECIDED ON THE BASIS OF WHETHER A FEDERAL CONSTITUTIONAL RIGHT TO INTERSTATE TRAVEL IS VIOLATED BY ANTI-ABORTION ACTIVITIES WHERE SOME OF THE CUSTOMERS CAME FROM OUT OF STATE. NO SUCH ISSUE EXISTS IN THE PRESENT CASE

The Petitioner herein, unable to find an independent reason for the Court to grant certiorari in this case, tries to copy from *Bray v. Alexandria Women's Health Center*, No. 90-985. Since the Petitioner relies so heavily on *Bray*, these Respondents will discuss this litigation more than would ordinarily be the case.

Perhaps the best reason this Court should deny certiorari in *Lewis* but grant certiorari in *Bray* (referred to in the lower courts as *National Organization For Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990) and 726 F. Supp. 1483 (E.D. Va. 1989) but referred to in this Court and here as *Bray*) is that the court in *Bray* dramatically expanded the scope of § 1985(3), an error which needs to be corrected; whereas in the instant case, no such mistake was made. The error in *Bray* cries out to be corrected, but appellant *Lewis*, on the other hand, has no business using § 1985(3) as armament for a general tort law claim. Thus the disposition of the present litigation is well-deserved and should not be disturbed.

Secondly, although the *Petitioner* lifts two issues from *Bray* and attempts to employ it to her advantage, it is clear that the authority in *Bray* was provided, if at all, by application of a federal constitutional right to travel. It should be remembered that Section 1985(3) provides no substantive rights itself, but only vindicates rights found elsewhere. *Scott, supra*, at 833. In

Bray, the basis of the ruling was the constitutional right to travel. *Bray*, 914 F.2d 582, 585. The three-judge panel, citing the district court, thought that rescue demonstrations interfere with the *right to travel* because women seeking the services of clinics in the Washington metropolitan area travel interstate to obtain these services. *Bray*, 914 F.2d 582, 585. Though most would dispel this theory as far-fetched, in *Bray* the issue as framed by the trial court was "Conspiracy to Interfere with Plaintiff's Right to Interstate Travel. Pursuant to 42 U.S.C. Section 1985(3)". *Bray*, 726 F. Supp. 1483, 1492 (E.D. Va. 1989). It is true that there was discussion of "class-based discriminatory animus", but a fair reading of the case reveals that the right to interstate travel was the foundation of the ruling.

In *Bray*, 726 F. Supp. 1483, 1493, the district court observed that the Plaintiff's *also alleged* that the Defendants rescue demonstrations violated § 1985(3), because they infringe on the so-called fundamental right of Plaintiff's members to obtain an abortion. This portion of the opinion, not found in favor of the plaintiff, is more like the claim of Lewis. The court recognized "the likely absence of state action" (*Bray* at 1493) and indicated in footnote 11 that the Plaintiffs must demonstrate some state action when the asserted constitutional deprivation is based upon a right guaranteed against government interference, such as the so-called right to abortion. The court commented that it "need not reach the merits of this doubtful argument" (that necessary state action was present when rescuers refuse to notify police). Thus, if Lewis relies on *Bray*, as she does, she should also reconcile the holding that state action must exist when the deprivation is based on a right against government interference.

The district court also cogently observed that "the law concerning putative abortion is in a state of flux". *Bray*, 726 F. Supp. 1483, 1494. It said that the decision of *Webster v. Reproductive Health Services* left *Roe* ripe for attack, noting Justice Rehnquist's observation that *stare decisis* has less power in constitutional

cases, where, save for constitutional amendments, this Court is the only body able to make needed changes. It cited the note of Justice Rehnquist that the *Roe* trimester framework falls into the category of being "unsound in principle and unworkable in practice". See footnote 13 on p. 1494 of panel opinion. Several instances emptying content of *Roe* were cited, even though *Roe* may not have been explicitly overruled. The point here is that it is unwise to rest the application of § 1985(3) on a so-called right to abortion, which may be no right at all or only a liberty interest, which is in terminal stages of retreat.

Although, even in *Bray*, it seems a stretch of the imagination to conclude that a constitutional right of interstate travel is interfered with just because some of the patrons of a business come from another state, which theory could be applied to almost any place located near the border of another state, or any business which uses mail sent from or delivered to another state, in this the *Lewis* case, the issue is specifically *disclaimed*. Appellant Lewis says "This question (violation of a federal constitutional right to interstate travel) is not tendered in the present case because, *in contrast to Bray*, it involves one individual plaintiff . . . whose complaint therefore shows no interstate travel." App. Br. p. 14 footnote 1, emphasis supplied.

Thus, when appellant Lewis identifies the questions in *Bray* as, except for violation of a constitutional right to travel, in substance the same as the ones herein, such identification is not genuine because without a finding that a constitutional right to travel was violated, other issues would never have been reached and addressed.

Appellees herein also observe that, although much litigation appears as a result of rescuers attempting to save lives through interference with access to abortion mills, few, if any, cases have been pursued on federal grounds in the context of a counseling situation. We submit that this is indicative of not only the novelty

of Appellant Lewis' position, but more to the point, its lack of merit.

For example, the District Court in *Bray* notes in an interesting fashion that an injunction request against activities that "tend to intimidate, harass or disturb patients" is overbroad. *Bray*, 726 F. Supp. 1483, 1497. The Defendants' First Amendment right to express views cannot be curtailed or limited because some persons are timid or reluctant to hear expressions of defendants' views on the issue of abortion. *Bray, supra.* Indeed, the First Amendment concept of a "free marketplace of ideas", taken seriously, necessarily entails that a citizen of a democracy has a duty to listen open-mindedly to opposing views on vital issues." See footnote 16 of District Court opinion. The alleged conduct of the Defendants in this case, even if offensive to the Plaintiff, fits squarely within the First Amendment concept of expression of opposing views.

Thus, *Bray* cannot fairly be compared to the present case. The similarity of one or two issues in a case decided on other grounds (right to travel), is not reason to say that the cases are essentially the same or involve substantially identical issues. Such an approach is ingenuous, and if the similarity of an issue in a case accepted by the Supreme Court is good reason for acceptance of another case, then Appellees respectfully submit that virtually every case filed in the federal system would be heard by the Supreme Court.

This Court, instead, should decline jurisdiction, such as it did in *Roe v. Abortion Abolition Society*, 811 F.2d 931 (5th Cir.), *cert. denied*, 108 S. Ct. 145 (1987).

III.

42 U.S.C. SECTION 1985(3) WAS NOT INTENDED TO PROTECT AGAINST OTHER THAN RACIAL OR RACIALLY-RELATED DISCRIMINATION

Aside from the great differences between *Bray* and *Lewis*, and the Appellant's faulty concept that if an appellate court accepts one case it should accept them all, the underlying law, fatally defective to the Appellant, fails to provide justification for extending § 1985(3) to unintended ends.

One would think that the intent of lawmakers making a law would provide a reasonable explanation of the coverage of that law. However, the Petition fails to mention, even in passing, the intent of Congress when this statute was passed. Since the meaning and application of § 1985(3) is the heart of Appellant's claim, the failure to mention legislative history is an indication that indeed no support for extension of § 1985(3) to the scope advanced by Appellant, was ever intended by the writers of the law.

It is significant to note that the passage of the Ku Klux Klan Act was in response to widespread violence and acts of terror directed at *blacks and their supporters* in the post-war South. Violent resistance to the changes of the reconstruction era in many southern states, including the transition from a slave to a free society, was led by a coalition of some southern Democrats and the Ku Klux Klan. The primary goal of this resistance was viewed by Congress as the dismantling of the system of reconstruction, as well as the dilution of political rights gained by blacks through the post-Civil War Constitutional Amendments. *Harrison v. KVAT Food Management, Inc.*, 766 F.2d 155, 157 (4th Cir. 1985).

The majority in Congress believed legislation was necessary to stem the tide of violence against blacks. The failure or

inability of local southern governments to control the Klan was troubling to Congress. *Harrison, supra*, p. 157. The legislative history of the Ku Klux Klan Act of 1871, of which Section 1985 is a part, indicates that this enactment was intended as an enforcement vehicle for the Thirteenth Amendment. Congress intended to provide black persons equal protection of the laws of the United States.

Against this back-drop of political terrorism, Congress enacted what is now 42 U.S.C. § 1985(3) affording a remedy for the vindication of the civil rights of those being threatened and injured, blacks, and advocates of the black cause. *Harrison, supra*, p. 157. See also: *Comment, A Construction of 1985(3) in Light of its Original Purpose*, 46 U. Chi. L. Rev. 402, 427 (1979) wherein it is stated that some courts and commentators have erroneously viewed the Ku Klux Klan Act as a general anti-discrimination statute, applying it to a broad range of inequalities never intended by the drafters of the act.

Thus, it is clear that Congress passed this statute as a cure for racial discrimination. Appellant, however, seeks to misapply this statute so that it somehow covers "a class of women who desire abortions".

The most recent United States Supreme Court case on the subject has questioned whether, "in the first place, Section 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans." *United Brotherhood of Carpenters and Joiners of American et al. v. Scott*, 463 U.S. 825, 836 (1983). The Court continues that the predominant purpose of Section 1985(3) was to combat the prevalent animus against Negroes and their supporters, which included Republicans. *Scott*, at 836. Even *Griffin v. Breckenridge, supra*, involved a racial problem. Congress has not expanded the scope of this statute, although it has had opportunity to do so. It should remain limited to conspiratorial discrimination based on race.

IV.

A MORAL BELIEF AGAINST ABORTION DOES NOT MEET THE REQUIREMENT OF A CLASS-BASED INVIDIOUS DISCRIMINATORY ANIMUS NECESSARY IN ORDER TO STATE A CLAIM FOR RELIEF, UNDER 1985(3); AND THE CLASS ATTEMPTED TO BE ASSERTED BY THE APPLICANT IS NOT A PROTECTED CLASS

As part of the continuing policy of Appellant to introduce into her brief any material desired, whether or not contained in the record, she purports to quote from a manual of Defendant Pearson Foundation. App. Br. 21, 22. No such extracts are anywhere recited in the Complaint. And for support of the allegations that were pled, appellant resorts to, among scant other citations, references to newspaper articles and a magazine.

As recited by the District Court, the Plaintiff frames her Complaint in terms of "moral-religious" beliefs of the Defendants. App. Br. A-11. The Complaint asserts that the Defendants:

> "posit a moral-religious standard for all society as well as themselves" . . . (they) view(s) abortion at any post-fertilization stage as the prohibited killing of any unborn child . . ." App. Br. A-36.

The Complaint continues to say that the Defendant Pearson Foundation, Inc., declares itself dedicated to the prevention of abortion by all means commensurate with the need to save the life of the unborn and the soul of the abortion bound woman, A-37, specially and unique to those self-martyred to a boundless cause of the salvation of others, and these Defendants professedly were. A-43. Thus, as pointed out by the District Court, it is claimed by Appellant Lewis that the motivation of the Defendants-Appellees is their moral-religious belief against abortion. A-11. The pre-occupation of the Appellant with

religion is made even more obvious when the Petition for Certiorari is read.

For example, she purports to quote the following passages nowhere reflected in the record. "There has never been such a holocaust perpetrated against motherhood and the most innocent of all God's creations, the unborn child." App. Br. 21. The preface also commends to the facility's volunteers a daily prayer "for the family, motherhood and unborn children." App. Br. 21. It begins, "St. Joseph and Mary, whose protection is so great before the throne of God, please petition our Father in Heaven to protect families, motherhood and their unborn children from abortion . . ." App. Br. 21, 22.

Despite the insincere disclaimer of Appellant that "it is not petitioner's purpose to denigrate any group's form of worship", the hostility against religion is expressed in no uncertain terms. It is thus clear that this case is not about § 1985(3), race, a class of anything, or an injured Plaintiff. It is instead about how someone dislikes religions, hardly a subject for the Supreme Court to review.

Expressed in terms of a class-based discriminatory animus, it is thus the "moral-religious belief against abortion" that allegedly is the motivation of the Defendants. However, as the District Court indicates, "the class does not exist independently of Defendants' actions, nor is there a common characteristic distinguishing the class from the rest of the population." App. Br. A-11. There must be a class-based invidiously discriminatory animus for a § 1985(3) action, but none exists herein.

A case similar to the present one is *Roe v. Abortion Abolition Society*, 811 F.2d 931 (5th Cir. 1987), wherein Plaintiffs attempted to form a conspiracy against persons who do not share the anti-abortion beliefs of the conspirators." The similarities between *Roe v. Abortion Abolition Society* and *Lewis v. Pearson, et al.*, however, extend far beyond definition of the same class. Plain-

tiffs in *Roe*, like the Plaintiff herein, claimed deprivation of numerous rights and intention infliction of emotional distress. A religiously motivated conspiracy was claimed to be present in *Roe*, as is claimed in the present case (see previous discussion). Some of the Plaintiffs in *Roe* were individual women, like Plaintiff Warna Lewis herein.

Holding that Section 1985(3) does not permit the allowance of a class-based animus directed at the class of persons who do not share Defendants' religious beliefs about abortions, the District Court in *Roe* dismissed Plaintiffs' claims. *Roe* at 933. The Appellate Court also held that 42 U.S.C. § 1985(3) does not itself provide any substantive rights (*Roe* at 933), did not intend to reach all tortuous conspiracies that interfere with the rights of others even if the rights were derived from the Constitution (*Roe* at 934), and held that no recognizable class was stated (*Roe* at 934). More particularly, the *Roe* Appellate Court held that the Plaintiffs failed to state a claim of discrimination against a class of persons because of their religion. *Roe* at 934. The class must exist independently of the Defendants' actions and not because of any alleged personal malice the conspirators may have toward them.[1]

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[1] See also *Doe v. Keane*, 658 F. Supp. 216, 221, 222 (W.D. Mich. 1987) where Plaintiff unsuccessfully attempted to define a class of "surrogate mothers". She was not a member of a class that existed except by virtue of the alleged discriminatory acts. See also *Wilhelm v. Continental Title Co.*, 72 F.2d 1173 (10th Cir. 1983). *Wilhelm* found that a class of "handicapped persons" was not in the contemplation of Congress in 1871, and therefore should not be included as a class in what is now Section 1985(3). The classes or groups to be protected by this Statute must be derived from statutory construction, and this Statute was enacted for a particular purpose and to meet particular conditions. *Wilhelm* at 1177. Other recent cases denying § 1985(3) application are *Trautvetter v. Quick*, 916 F.2d 1140, 1153 (7th Cir. 1990), *Garrie v. Gray*, 912 F. 2d 808 (5th Cir. 1990), and *McCalden v. California Library Ass'n*, 919 F.2d 538 (9th Cir. 1990).

Thus although the "animus" that the appellant complains of is the "moral-religious belief against abortion" of the Defendants, this fails to qualify as a class-based invidious discrimination animus required by the Courts. Appellant thus fails, in paragraph II page 16 of her Petition to comprehend the order of submitting a constitutional-type issue to a jury. It must first be determined by a court that such a cause of action exists. Then, and only then, may the plaintiff be entitled to submit her claim for consideration by a jury.

V.

A "FUNDAMENTAL RIGHT TO ABORTION" DOES NOT EXIST, BUT WHATEVER RIGHT OR INTEREST THAT DOES EXIST, IF ANY, DOES NOT EXIST AGAINST PRIATE CONDUCT

It is no secret that the so-called right to an abortion, the intentional taking of a human life, is and has been under heavy attack since the day of its decision.[2] Since *Roe v. Wade*, 410 U.S. 113 (1973), about twenty-two abortion cases have been reviewed by this Court, and many more have been brought but not been granted review or have been dealt with summarily.[3]

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[2] For example, see Rice, *The Dred Scott Case of the Twentieth Century*, 10 Hous. L. Rev. 1059 (1973); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L. J. 920 (1973); and Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159, 184.

[3] *Abortion and the Constitution*, Appendix One (D. Horan, E. Grant and P. Cunninham eds. 1987).

Roe has been criticized as "read(ing) like a set of hospital rules and regulations, whose validity is good enough this week, but will be destroyed with new statistics."[4]

Roe has been undermined by subsequent changes and development in the law. See, for example, *Thornburgh v. American College of Obstetrician and Gynecologists*, 476 U.S. 747, 783 (1986) where Burger, C.J. in dissent observes "The extent to which the Court has departed from the limitations expressed in Roe is readily apparent." There also has been a significant alteration in the state of abortion law. For example, see *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989) where all of the challenged provisions of the Missouri statute were upheld. The willingness to uphold laws to protect life is a dramatic change from this Court's prior pattern of striking down every meaningful regulation of abortion.

In addition the alteration of abortion jurisprudence is evidence in the disappearance of majority support for the trimester scheme set up in Roe. The Honorable Justice O'Connor declared her belief that a state has a compelling interest in unborn life and maternal health throughout pregnancy in her earlier dissent to *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983). "I . . . remain of the views I expressed in my dissent in Akron. The state has compelling interest in ensuring maternal health and in protecting potential human life . . . throughout

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[4] A. Cox, *The Role of the Supreme Court in America* 113-14 (1976). See also Bopp and Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U.J. Pub. L. 181 (1989), one of the best discussions of Roe. Also see Bopp, *Will There Be a Constitutional Right to Abortion After the Reconsideration of Roe v. Wade?*, 15 J. Contemp. L. 131, 134 (1989). Wardle, *supra*, *Rethinking Roe v. Wade*, 1985 B.U.U. L. Rev. 231; Knicely, *The Thornburgh and Bowers Cases: Consequences for Roe v. Wade*, 56 Miss. L. J. 267, 281 (1986); Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 1985 N.C.L. Rev. 375.

pregnancy". With the Honorable Justices Rehnquist, White, Scalia and Kennedy declaring the same view in *Webster*, five justices have now recognized that a state's interest in protecting unborn human life exists throughout pregnancy.

Also, the *Webster* plurality declared that a woman has at most only a liberty interest in abortion under the Fourteenth Amendment, not a fundamental right to abortion as *Roe* held. *Webster*, 109 S. Ct. 3058. The Honorable Justice Scalia concurs that there is no fundamental right to abortion. *Id.* at 3064-67.

Since at least five members of this Court would appear to agree that, at a minimum, there is no general fundamental right to abortion, the foundation of Plaintiff Lewis claim, the "meat" to the § 1985(3) sandwich, does not exist. The sandwich consists of only bread, and is not a sandwich at all.

That further great changes in *Roe* will happen seems inevitable. Precedents of a court are not sacrosanct, especially in the area of constitutional interpretation unlike the context of legislative interpretation, where Congress remains free to alter what the Court has done. *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989). The direction of the court seems to be against creating "constitutional fundamental rights". For example, see *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986) where the court concluded that there was no fundamental right to commit homosexual sodomy. It was also claimed that a right to engage in such conduct is deeply rooted in this nation's history. *Bowers* at 2846. Also, in *Michael H. v. Gerald D.*, 109 S. Ct. 2333 (1989) the court held there is no fundamental right to visitation of a child because states have historically presumed that a child born within a marriage is the product of that marriage, and rejected visitation claims by adulterous fathers.

Roe v. Wade has created inherent confusion in the law (for example, the trimester concept itself, physician discretion, informed consent, and record keeping) operates contrary to other

laws designed to protect unborn human life (for example, the rights of the unborn in tort law, wrongful death actions, equity, and criminal law), and is inconsistent with the sense of justice and social welfare, especially in light of advanced medical technology since 1973. For a full discussion of these individual points, see Bopp and Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, B.Y.U. Journal of Public Law.

Thus, in light of the aforesaid factors, the notorious assumptions of the Appellant that not only does she have a fundamental right to abortion, but also that right, if it exists, constitutes a basis for § 1985(3), are in error. Furthermore, whatever right or interest exists, if any, exists against *governmental interference*. In the present case, however, Appellant sues as a *private individual* attempting to vindicate *private rights*.

Appellant's Petition, except as discussed by the cases contained in the appendix, seems to skip the issue of state action. A reader is left with the impression that the Appellant feels no need to demonstrate state action, an assumption contrary to law.

The Complaint does assert that the attorney general of Missouri should enforce its Merchandising Practices Law, that the non-enforcement of a statute is the equivalent of state action, and that the Attorney General has stated that the defendants' advertising does not constitute misrepresentation. A-43. Thus the Appellant would apparently presume state action whenever a state has legislation that someone believes is applicable and should be enforced, whether against the law or not.

The leading case on the applicability of § 1985(3) specifically held that when an alleged conspiracy is aimed at a right that is a right against state interference, the Plaintiff must prove that the conspiracy contemplated state involvement. *Scott, supra*, at 833. *Roe v. Wade, supra*, prohibited alleged state legislative interference with abortion. However, the Fourteenth Amendment

protects an individual against state action, not against wrongs done by individuals. *Scott, supra*, at 1056 (quoting Justice Douglas and Justice Fortas). *Scott* distinguished *Griffin* by ruling that if the right sought to be protected is a right against state interference, state involvement must be shown. *Scott*, 463 U.S. at 834.

Even if there is a fundamental right to an abortion, an extremely questionable proposition which this court could specifically deny herein, nevertheless no such right to or interest in an abortion exists in the absence of state action.

Griffin did not dispense with the requirement of state action in every § 1985(3) claim. *Portland Feminist Women's Health Center et al. v. Advocates for Life, et al.*, Civil No. 86-559-FR 9 (C.Ct. Oregon, March 4, 1988) similarly dismissed a 42 U.S.C. Section 1985(3) complaint brought by a feminist Women's Health Center, its directors, employees, and several clients of the Health Center. The named defendants were Advocates for Life, Inc., Christians in Action, and twelve individuals, "all of whom are opposed to abortion."

This case is factually similar to the present case in many respects. A client was one of the plaintiffs, it was claimed that infliction of mental distress was committed, and also like the present case, the sole federal question was a claim under 42 U.S.C. § 1985(3). The court analyzed the issue of whether a class composed of women seeking to terminate their pregnancies by abortion is a protected class under 42 U.S.C. Section 1985(3). In addition, plaintiffs in *Portland* asserted that the defendants conspired to deprive women of their alleged federal constitutional right to choose abortion. This case is also similar to the present case in that the named defendants were Christians and individuals opposed to abortion. Recitations of religion and opposition to abortion saturate the Complaint of this Appellant Lewis. (See previous discussion in paragraph IV of this Brief.)

After discussing both *Griffin* and *Scott*, the *Portland* court held that although the recognition of a constitutional right to privacy has been held to guarantee to women the right to make certain fundamental intimate choices without governmental interference, it does not, however, protect that right from alleged *private* interferences. *Portland, supra.* Since no state action existed, the claim under § 1985(3) was dismissed.

It is requested that the claim compare the allegations of paragraph 16 of the Complaint (A-43), to the definition of state action set forth in *Briscoe v. Bock*, 540 F.2d 392 (8th Cir. 1976). There the Court held that even though the Defendant Hospital received public funds, had tax exempt status, belonged to a health planning agency authorized by federal law, and was subject to state regulation, there was no state action. State action can only exist when there is sufficiently close nexus between the state and the challenged action of the regulated entity, so that the latter may be fairly treated as that of the state itself. *Briscoe, supra*, 392, 395.[5]

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[5] Numerous other pertinent cases on the subject of state action are: *Pariser v. Christian Health Care Systems*, 627 F. Supp. 39 (E.D. Mo. 1984), there is state action only when it can be said that the state is *responsible* for the specific conduct of which the plaintiff complains; *Lamb v. Farmers Insurance Co.*, 477 F. Supp. 126, 127 (1979) and also 611 F.2d 702, 703 (8th Cir. 1979), acknowledging the essential element of state action; *Dworkin v. Hustler Magazine, Inc.*, 634 F. Supp. 727, 730 (D. Wyo. 1986), *Griffin* should only be read in the context of the Thirteenth Amendment — a claim of conspiracy to interfere with rights protected under the Fourteenth Amendment still requires some kind of state action or involvement; *Thomas v. Rohner-Gehrig and Company*, 582 F. Supp. 669, 673 (1984), and *Doe v. Keane*, 658 F. Supp. 216, 221 (W.D. Mich. 1987), any violation of the Fourteenth Amendment sought to be redressed through 42 U.S.C. § 1985(3) must be predicated on state action; *Grossling v. Ford Memorial Hospital*, 614 F. Supp. 1051 (D.C. Tx. 1985), mere approval of or acquiescence in private activity is insufficient to prove state involvement; *Prov. Gov. of Rep. of New Afrika v. Amer. Broadcast*, 609 F. Supp. 104 (D.C.D.C. 1985), 42 U.S.C. Section 1985(3) was passed pursuant to the Thirteenth Amendment, the latter of which standing

(Footnote 5 continued on next page)

Simply stated, state inaction is not action. See *Flagg Brothers, Inc. v. Brooks, et al.*, 436 U.S. 149 (1978).

CONCLUSION

The Petition was filed too late and the Court has no jurisdiction over this matter.

The Appellant would like to re-write 42 U.S.C. Section 1985(3) to include coverage for the individual Plaintiff involved herein. So would every other Plaintiff. However, this Statute was not intended to be a general federal tort law, and instead was passed to protect against racial discrimination.

It is obvious from legislative history, case law both prior and subsequent to *Griffin* and *Scott*, the latter two Supreme court cases themselves, and a fair reading of the statute, that the Appellant has failed to allege a class-based discriminatory animus the statute was intended to protect against.

It is further apparent that the claims "animus" presented in the Complaint and reinforced by the Appellant's Petition is a pro-life motivation designed to save babies, which Appellant labels a "moral-religious belief against abortion." However, this is not equivalent to racial or racially-related hatred required for application of § 1985(3).

Similarly the class attempted to be asserted by the Plaintiff Lewis is not a class protected by the statute.

(Footnote 5 continued)

alone did not provide a direct cause of action to eradicate the vestiges of slavery. *Watkins v. Mercy Medical Center*, 520 F.2d 894, 896 (9th Cir. 1975), and *Ascherman v. Presbyterian Hospital*, 507 F.2d 1103, 1105 (9th Cir. 1974), both of which hold the involvement of the state must be significant.

Most importantly, Plaintiff's theory hinges on the assumption that there remains a constitutional "fundamental right to abortion", a concept which does not presently exist or which is in total retreat for a host of reasons, the most important of which is that the killing of innocent human life is wrong. Current case law would appear to indicate that there is, at most, only a liberty interest, insufficient foundation for a § 1985(3) action. Even if there exists a fundamental right to abortion, it has been theorized as arising from the Fourteenth Amendment. Since this amendment is directed against official conduct, state action must be demonstrated. The allegation of the Petition are absent of state action, and state inaction is not the equivalent of state action.

Respectfully submitted,

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